U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES E. MANNING and U.S. POSTAL SERVICE,
POST OFFICE, Hauppauge, NY

Docket No. 99-706; Submitted on the Record;
Issued April 17, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's monetary compensation entitlement, effective November 8, 1996, on the grounds that he refused an offer of suitable work; and (2) whether the Office abused its discretion is denying appellant's request for further review of his case on its merits under 5 U.S.C. § 8128(a).

The Office accepted that on August 24, 1990 appellant, then a 30-year-old distribution clerk, sustained right shoulder strain due to overuse syndrome, for which he subsequently underwent a right shoulder subacromional decompression and bursectomy on July 31, 1992 and thereafter a repeat right shoulder arthroscopy with debridement. He was granted appropriate compensation benefits and was eventually able to return to work on September 24, 1994, when he filed a claim for recurrence of disability. Appellant stopped work following the recurrence and did not return.

By report dated June 13, 1995, Dr. Edouard Kamhi, a Board-certified surgeon, opined that at that point appellant had not been able to return to work at the employing establishment, and he recommended a further arthrogram of appellant's right shoulder to rule out a rotator cuff tear.

In a report dated February 10, 1995, Dr. Jimmy U. Lim, a Board-certified orthopedic surgeon, noted appellant's history of injury and present symptoms of restricted right arm use and he opined: "[Appellant] has a subacromial impingement which will require an open subacromial decompression of his right shoulder." Dr. Lim indicated that he was awaiting approval of the recommended surgery.

By report dated August 30, 1995, Dr. Lim noted that appellant "still has problems with the shoulder.... He still has limited abduction, elevation. He will need open subacromial

decompression after the arthrogram." Dr. Lim indicated that appellant could perform modified work.

On February 27, 1996 Dr. H.A. Packer, an employing establishment physician, noted that appellant had developed "post-traumatic arthritis" with "pain in the [right] side of the neck to pain in the [right] shoulder" and that "repetitive motions of [right] upper extremity causes pain, pain in bed at night -- interferes with his sleep." Dr. Packer noted that, upon examination, appellant had restricted forward elevation and restricted abduction. He indicated on a Form CA-17 duty status report that appellant could perform sedentary work 4 to 6 hours per day using only his left hand, with lifting of no more than 10 pounds.

On February 29, 1996 Dr. Lim completed an attending physician's supplemental report diagnosing "subacromial impingement syndrome of [right] shoulder," and he checked "yes" to the question of whether appellant was totally disabled for his usual work. He noted that appellant had a permanent restriction on lifting with the right arm and he requested authorization for an open decompression of the subacromial space of the right shoulder.

On March 6, 1996 appellant rejected a job offer from the employing establishment, with Dr. Lim annotating the form stating that surgical decompression of appellant's right shoulder was necessary before he could return to work.[1] Despite his explanation supporting appellant's job offer refusal, the employing establishment requested that the Office find the offered position suitable.

The Office determined that a second opinion medical examination was required, and it referred appellant, together with a statement of accepted facts, questions to be addressed and the relevant case record, to Dr. John C. Killian, a Board-certified orthopedic surgeon. By report dated May 16, 1996, Dr. Killian reviewed the case record, performed a physical examination, and opined:

> "The physical examination was remarkable for complaints of tenderness over the bicipital groove and the anterior superior region of the shoulder. He did have some complaints of anterior superior pain with anterior stress testing…. Based on these findings, I would conclude that [appellant] does have a mild residual impairment with respect to the use of his right upper extremity which does appear to be attributable to the August 24, 1990 incident. I do feel that this represents a mild partial disability. The physical findings suggest pathology in either the biceps tendon or the anterior superior glenoid region, which may represent a partial detachment of the biceps tendon at its origin at the anterior superior glenoid. At this stage I do feel that further orthopedic evaluation and treatment is appropriate. I do feel that he should be allowed to go to the shoulder service at Columbia Presbyterian Medical Center for further evaluation and treatment.... I do feel that another arthroscopy and a more complete arthroscopic or open subacromial decompression is appropriate as well as any procedure that is necessary to deal with the possible intraarticular pathology. I do feel that he is

[1] The job offered was working six hours per day seated at a desk repairing damaged mail and placing it into trays.

> capable of returning to work at a limited capacity at this time which should not involve strenuous use of the right upper extremity or overhead activity. His future prognosis will depend on the results of his further evaluation and orthopedic treatment."

Dr. Killian completed an OWCP-5 work capacity evaluation noting that appellant should limit lifting to no more than five pounds, limit lifting with the right hand, limit overhead activities with his right arm, restrict pushing and pulling and limit lifting to one hour per day intermittently. Dr. Killian checked "yes" to the question of whether appellant could work eight hours per day, but noted that he had not reached maximum medical improvement.

On June 6, 1996 the Office granted Dr. Lim authorization for a subacromial decompression of the right shoulder and evaluation and treatment at Columbia Presbyterian Medical Center.

Also by letter dated June 6, 1996, the Office advised Dr. Lim that Dr. Killian's report constituted the weight of the medical evidence of record as Dr. Lim's reports failed to support, with sound medical reasoning, appellant's continued disability based on any objective findings.

On June 7, 1996 the employing establishment again offered appellant a light-duty job for six hours per day, which appellant rejected on June 12, 1996 indicating that "this was the same work I was doing when I reinjured my shoulder on September 24, 1994 and do not want to cause further injury to my shoulder." Appellant indicated that he was totally disabled and in a lot of pain, and Dr. Lim annotated the job offer form noting that an open surgical decompression was necessary before appellant could go back to work.

By form report dated June 10, 1996, Dr. Lim indicated that appellant was "temporary disabled."

On July 1, 1996 the Office reiterated to Dr. Lim its authorization to perform the decompression. In a response dated July 1, 1996, Dr. Lim noted that appellant still had shoulder problems with a great deal of right shoulder pain and would be scheduled for surgery for an open decompression as soon as possible, which was projected to be sometime in late August. He noted that appellant "still states that he is incapable of working because of the pain with limitation of movement, abduction and elevation of the right shoulder."

On July 2, 1996 the Office conferred with the employing establishment, noted that Dr. Killian stated that appellant could work eight hours per day, recommended that the employing establishment offer appellant a light-duty job for eight hours per day and noted that if appellant rejected it, his benefits would be terminated for refusal of suitable employment.

By report dated August 12, 1996, Dr. Evan L. Flatow, a Board-certified orthopedic surgeon specializing in shoulders, diagnosed post-traumatic rotator cuff disorder with right shoulder impingement and opined that revision surgery was a reasonable option for appellant, and was the best chance for as much functional improvement and pain relief as possible. Right shoulder arthroscopy including an open revision acromioplasty was recommended.

On August 5, 1996 Dr. Lim opined that appellant was totally disabled for his usual work.

By letter dated September 11, 1996, the Office advised appellant that the employing establishment had offered him a job that was consistent with his work restrictions as determined by the second opinion examiner, Dr. Killian; it advised that this job was found to be suitable to his partially disabled condition, that it remained available, and that appellant had 30 days within which to accept the offer or to provide reasons in support of his refusal. The Office advised appellant of the provisions of 5 U.S.C. § 8106(c) regarding his continued receipt of compensation benefits.

Nothing further was received from appellant during the 30-day period.

By decision dated November 8, 1996, the Office terminated appellant's monetary compensation benefits effective that date finding that he, under 5 U.S.C. § 8106(c), was no longer entitled to monetary compensation as he had unreasonably refused an offer of suitable work. The Office noted that this determination was based upon the second opinion medical specialist.

By letter dated November 13, 1996, appellant requested an oral hearing. However, this request was thereafter withdrawn.

By letter dated January 8, 1997, Dr. Flatow reviewed the position offered to appellant and he opined that appellant "will be unable to perform this job and I believe that it is medically unsuitable." He indicated that the job as described required "repetitive use of appellant's arm and shoulder, which would likely at least aggravate and perhaps damage his shoulder." Dr. Flatow again reiterated appellant's need for further surgery.

On February 13, 1997 the Office received a copy of the July 12, 1996 suitable job offer annotated by appellant on October 3, 1996 stating that he refused the offered position, that it was the same position he was performing when he reinjured his shoulder and that he was in a lot of pain and was awaiting further surgery.

On April 7, 1997 the Office then determined that there was a conflict in medical opinion evidence, and it referred appellant, together with a statement of accepted facts, questions to be addressed, and the relevant case record, to Dr. Stanley Feingold, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict.

By report dated April 24, 1997, Dr. Feingold reviewed the statement of accepted facts and the relevant case record, noted appellant's factual and medical history, conducted a complete

and thorough physical examination, and found normal range of motion, but found tenderness to palpation over the anterior medial aspect of the right shoulder and he opined:

> "I feel that [appellant] could have returned to a light-duty mode of employment on July 12, 1996. [Appellant] could lift packages weighing from 5 to 10 pounds without any difficulty provided that he did not lift them above shoulder level. [Appellant] could perform in a light-duty mode of employment for eight hours a day without any limitations or restrictions.
>
> "Due to the chronicity of [appellant's] symptomatology and with tenderness over the anterio-medial aspect of [his] right shoulder in the region of the long head of the biceps tendon, I feel that surgery should be authorized to [appellant's] right shoulder."

By decision dated May 1, 1997, the Office denied modification of the termination order finding that the evidence submitted in support was insufficient to overcome the special weight accorded the opinion of the impartial medical examiner.

Surgery for an arthroscopic right revision and subacromial decompression and a distal clavicle resection was performed on June 12, 1997 without complications. Postoperatively Dr. Flatow opined that appellant was totally disabled for his usual employment and required physical therapy.

By letter dated February 6, 1998, appellant again requested reconsideration and in support he submitted a September 16, 1997 report from Dr. Flatow, who noted that, prior to the surgery, appellant had "severe constant pain in the anterior right shoulder," that he had previously opined that the job offered to appellant was unsuitable and that he was totally disabled, and that he could not work "until this arm has been better rehabilitated."

By decision dated April 29, 1998, the Office denied modification of the prior decision finding that the evidence submitted was insufficient to warrant modification.

By letter dated June 28, 1996, appellant again requested reconsideration based upon legal argument. He argued that Dr. Feingold relied on stale evidence, performed no testing of his own, and gave a conclusory opinion without a medical explanation of how he reached his conclusion. Appellant claimed that Dr. Feingold's retroactive determination was not supported by medical evidence or rationale.

On July 29, 1998 appellant accepted a job offered by the employing establishment working in the nixie section, which was sedentary and required simple grasping.

By decision dated September 28, 1998, the Office denied appellant's request for a further review of his case on its merits. The Office determined that the "information" was cumulative, repetitious or irrelevant.

The Board finds that the Office properly terminated appellant's compensation entitlement effective November 8, 1996 on the grounds that he refused an offer of suitable work.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[2] After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[3]

Further, section 8106(c)(2) of the Federal Employees' Compensation Act states that a partially disabled employee who refuses to seek suitable work, or refuses or neglects to work after suitable work is offered to, procured by, or secured for him is not entitled to compensation.[4] The Office has authority under this section to terminate compensation for any partially disabled employee who refuses suitable work when it is offered. Before compensation can be terminated, however, the Office has the burden of demonstrating that the employee can work, setting forth the specific restrictions, if any, on the employee's ability to work and has the burden of establishing that a position has been offered within the employee's work restrictions, setting forth the specific job requirements of the position.[5] In other words, to justify termination of compensation under 5 U.S.C. § 8106(c)(2), which is a penalty provision, the Office has the burden of showing that the work offered to and refused by appellant was suitable.[6] The initial step for the Office in meeting this burden of proof is to determine whether appellant has the capacity to perform work of some sort.

The Office has met this burden in the instant case.

Appellant submitted medical evidence from his treating physicians, Drs. Kamhi, Lim and Flatow, which supported that appellant had restricted use of his right arm that was accompanied by pain, which they opined rendered him totally disabled for his usual employment. Dr. Lim recommended that further surgery be performed, and that surgery was approved by the Office. On January 8, 1997 Dr. Flatow reviewed the position offered to appellant and opined that appellant would be unable to perform the job and that the job was medically unsuitable, as it required repetitive use of appellant's arm and shoulder which would aggravate or damage his shoulder.

However, Dr. Packer, an employing establishment physician, indicated that appellant could perform sedentary work for 4 to 6 hours per day using only his left hand, with lifting of no more than 10 pounds and the second opinion specialist, Dr. Killian, opined that appellant was capable of returning to work in a limited capacity at that time which should not involve strenuous use of his right upper extremity or overhead activity. Dr. Killian completed a work restriction evaluation indicating that appellant should limit lifting to no more than five pounds,

[2] *Harold S. McGough*, 36 ECAB 332 (1984).

[3] *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

[4] 5 U.S.C. § 8106(c)(2).

[5] *Frank J. Sell, Jr.*, 34 ECAB 547 (1983).

[6] *Glen L. Sinclair*, 36 ECAB 664 (1985).

limit lifting with the right hand, limit overhead activities with his right arm, restrict pushing and pulling, and limit lifting to one hour per day intermittently. He indicated that appellant could work eight hours per day.

The Act, at 5 U.S.C. § 8123(a), in pertinent part, provides: "If there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."

In this case the Office found that there was a conflict in medical opinion evidence between appellant's treating physicians, Drs. Kamhi, Lim and Flatow, who supported that appellant remained totally disabled and unable to work, and Drs. Packer and Killian, who opined that he could work at least four to six hours per day with right upper extremity activity restrictions.

Thereafter the Office properly referred appellant, together with a statement of accepted facts, questions to be addressed, and the relevant case record, to Dr. Feingold, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict.

Dr. Feingold reviewed appellant's factual and medical history and the reports of record, performed a complete physical examination, and found normal range of motion and tenderness to palpation over the anterior medial aspect of the right shoulder. He opined in a complete and well-rationalized report that appellant could have returned to a light-duty mode of employment on July 12, 1996, lifting packages weighing from 5 to 10 pounds without any difficulty, provided that he did not lift them above shoulder level. Dr. Feingold concluded that appellant could perform light duty eight hours per day.

The Board has frequently explained that where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.[7]

In this case Dr. Feingold's report was sufficiently well rationalized and was based upon a proper factual and medical background, such that it is entitled to that special weight. According Dr. Feingold's report that special weight results in it becoming the weight of the medical opinion evidence of record and establishing that appellant could perform limited duty eight hours per day as of July 12, 1996.

A subsequent report from Dr. Flatow, which essentially repeated his earlier findings and conclusions, was insufficient to overcome the weight accorded to the impartial medical specialist, and was also insufficient to create a new conflict, as Dr. Flatow was on one side of the conflict in medical opinion that was resolved by the opinion of the impartial medical specialist, Dr. Feingold.[8]

[7] *Aubrey Belnavis*, 37 ECAB 206, 212 (1985).

[8] *See Thomas Bauer*, 46 ECAB 257 (1994); *Virginia Davis-Banks*, 44 ECAB 389 (1993).

As the weight of the medical opinion evidence of record supported that appellant could work light duty for eight hours per day, and as the physical requirements of the job offered appellant by the employing establishment were within appellant's work capacity as determined by Dr. Feingold, the job was suitable to his partially disabled condition, and therefore appellant refused an offer of suitable work. As appellant refused an offer of suitable work, he is not entitled to further monetary compensation benefits.

The Board further finds that the Office did not abuse its discretion in denying appellant's request for a further review of his case on its merits under 5 U.S.C. § 8128(a).

Section 8128(a) does not require the Office to review final decisions of the Office awarding or denying compensation. This section vests the Office with the discretionary authority to determine whether it will review a claim following the issuance of a final decision by the Office.[9] Although it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under 5 U.S.C. § 8128(a),[10] the Office, through regulations, has placed limitations on the exercise of that discretion with respect to a claimant's request for reconsideration. By these regulations, the Office has stated that it will reopen a claimant's case and review the case on its merits whenever the claimant's application for review meets the specific requirements set forth in sections 10.138(b)(1) and 10.138(b)(2) of Title 20 of the Code of Federal Regulations.

To require the Office to reopen a case for reconsideration, section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides in relevant part that a claimant may obtain review of the merits of his claim by written request to the Office identifying the decision and specific issue(s) within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed and by:

"(i) Showing that the Office erroneously applied or interpreted a point of law or

"(ii) Advancing a point of law or fact not previously considered by the Office or

"(iii) Submitting relevant and pertinent evidence not previously considered by the Office."[11]

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will denied by the Office without review of the merits of the claim.[12] Where a claimant fails to submit relevant evidence not previously of record or advance legal contentions

[9] *Gregory Griffin*, 41 ECAB 186 (1989), *reaff'd on recon.*, 41 ECAB 458 (1990).

[10] *See Charles E. White*, 24 ECAB 85 (1972).

[11] 20 C.F.R. § 10.138(b)(1).

[12] 20 C.F.R. § 10.138(b)(2).

not previously considered, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128 of the Act.[13]

In the instant case with his June 28, 1998 request for reconsideration, appellant presented arguments with regard to Dr. Feingold's findings and conclusions. Appellant argued that Dr. Feingold relied on stale evidence, performed no testing of his own and gave a conclusory opinion without a medical explanation of how he reached his conclusion, and that his retroactive determination was not supported by medical evidence or rationale. However, the Board notes that these contentions are not supported by the record and are therefore unfounded and irrelevant. Dr. Feingold was provided with a complete and accurate factual and medical history, including the statement of accepted facts and the complete case record containing the most recently submitted evidence and including a description of the light-duty job offered. The evidence was therefore not stale. Dr. Feingold documented that he performed a complete and thorough physical examination and he provided well-rationalized conclusions based upon his objective examination results and the totality of the medical evidence of record. Therefore, Dr. Feingold's opinions were not conclusory or unsupported. As appellant's arguments are determined to be unfounded and irrelevant, they are insufficient to require the Office to reopen appellant's case for further review on its merits under 5 U.S.C. § 8128(a), and therefore the Office did not abuse its discretion by denying such a review.

As the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from known facts.[14] Appellant has demonstrated no such abuse in this case.

[13] *Joseph W. Baxter*, 36 ECAB 228 (1984).

[14] *Daniel J. Perea*, 42 ECAB 214 (1990).

Accordingly, the decisions of the Office of Workers' Compensation Programs dated September 28 and April 29, 1998 are hereby affirmed.

Dated, Washington, DC
April 17, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member